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CASES CITED

TEXTBOOKS

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 27

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE TRENTON POTTERIES COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

STATEMENT

This brief will be exclusively in the nature of a reply to the brief filed on behalf of the defendants (the respondents). Three new points are raised in that brief which were not considered in the opinion of the Circuit Court of Appeals, to which this writ of certiorari is directed, and which were therefore not considered in the original brief on behalf of the plaintiff (the Government). In addition to a reply to these points, we will make here a brief answer to certain of the points presented on behalf of defendants relative to the issues raised in the opinion of the Circuit Court of Appeals.

(The brief on behalf of defendants will be herein referred to as D. Br., and the original brief on behalf of plaintiff as P. Br. The numbering of points herein will follow that of D. Br.)

THE FACTS

Defendants open their brief with a criticism of the brevity of the statement of facts in the brief of plaintiff (pp. 3–7) and with a lengthy statement of the facts as seen from their point of view. It is unnecessary for this Court to make an exhaustive study of the facts. Their determination was for the jury. No question is raised that they were not sufficient to support their submission to the jury under the charge of the court.

The only suggestion that the Government has failed to prove a price-fixing agreement appears at p. 20 of D. Br. The argument is that the Government relies for proof upon the fact that bulletin prices were largely uniform. The fault with the argument is that the Government did not rely upon the comparative uniformity in bulletin prices as its sole proof of the unlawful agreement.

The basis of the Government's case on the facts was that basic price lists were actually adopted at meetings of the defendants' association. (R. 40–42, 393.) This fact alone would be sufficient to support a verdict, but the Government added other elements of proof. It was shown that prices and discounts were discussed at meetings of the association. (R. 476, 480, 487, 179–180.) It was shown

that various defendants consulted the secretary of the association in regard to "regulation prices" (R. 866 and other correspondence in Vol. II of the Record), and that complaints were made by members when other members were not adhering to the agreement. This was circumstantial evidence from which an agreement could clearly be inferred. It was shown that uniformity existed among the defendants in terms of credit (R. 766, 2592–2970), in crating charges (R. 777, 894–897), in extra charges for special work (R. 867, 940–943). This was further evidence from which the same inference could be drawn. It was further shown that there was a percentage of uniformity of approximately 80 per cent in the sales prices shown on the bulletins of the different companies. (R. 318.) This last was but one additional element of the proof.

QUESTIONS PRESENTED

The disputed issues in this case are issues of law—as to the jurisdiction of the court, the indictment, the admission and exclusion of evidence, the charge.

ARGUMENT

I

CONCERNING THE RULE OF REASON

It is suggested (D. Br. 39) that the Government seeks to set up a single exception—that of agreements in regard to *price*—to "the great standard"

of the common law as to reasonableness of restraints of trade.

We do not confine ourselves to prices, but present the doctrine that an agreement among those who control a substantial proportion of the production of a commodity to eliminate an essential subject of competition is an unlawful combination in restraint of trade. Thus, it is illegal to allot sales areas (*Addyston Pipe case,* 85 Fed. 271, aff. 175 U. S. 211) or to limit sales to a particular class of persons (*Eastern States Retail Lumber Dealers' case,* 234 U. S. 600; second count of this indictment), or to fix uniform prices (first count of this indictment), if such acts are done by agreement. No doubt, the evil of fixed prices is the type that has most frequently come to the attention of this Court and that has been most frequently condemned. This may be partly due to the fact that the effect of any one of these unlawful agreements is in common experience to influence and restrain competitive prices.

Such agreements have been read by the courts under the common-law lights of reason and public policy, and condemned. Cases cited in P. Br. 11–27.

At each trial, therefore, the duty upon the court is to describe to the jury the type of contract or combination which is unlawful, and to submit to the jury the questions whether or not the defendants have entered into such a contract or combination.

In equity of course the questions of fact as well as of law are for the court. Thus, in the *Steel Corporation case* in the lower court, 223 Fed. 55, 61 (D. Br. 34) the broad statement by the court that the basic question as to undue restraint of trade is one of fact is explained by the remainder of the paragraph from which defendants' quotation is taken, viz, that it was necessary for the court of equity to determine whether the Steel Corporation was as a matter of fact guilty of any of those trade practices, which as a matter of law would constitute undue restrictions upon competition or restraints of trade. So in the case at bar the question was properly submitted to the jury whether this combination was in fact one of that class, which by its inherent nature is unlawful under the decisions of this Court.

When a given state of facts has been treated by a high court in an authoritative way, the decision tends to establish a rule of law applicable in future cases to that particular state of facts. A series of equity decisions by this Court on similar states of fact might commence with the consideration of a question of fact and conclude with the establishment of a rule of law. Equity is no longer measured by the length of the chancellor's foot. The rule the interpretation of statute thus established by a long line of authority would be of automatic application in future cases under the same statute, whether civil or criminal.

However, it does not appear that the determination that an agreement upon uniform prices is an unreasonable restraint of trade even originated as a determination of fact. Not this question alone, but all questions as to the rule of public policy applicable to the validity of contracts, were determined at common law as questions of law for the court. Thus, on demurrer to a complaint at common law in *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall. 64, 71, the validity of the contract was passed upon by this Court. Had the question been one of fact, it would of course have been left to the jury. The English rule was to the same effect. Cases cited in *United States* v. *Addyston Pipe & Steel Company*, 85 Fed. 271.

The difficulty of distinguishing between the concept of reasonable restraint of trade and the concept of reasonable price has led some trial judges into error.

On the one hand is the danger of holding that because reasonableness of price is not an issue there can be no question of reasonableness in a case. On the other is the danger of holding that because reasonableness of restraint is in issue so also is reasonableness of price?

The trial judge in the case at bar made loose statements in answer to a motion by defendants' counsel that indicated a possible misapprehension on his part of the former type. But this could have no effect upon the case. He charged the jury

upon a correct statement of the law. He may have been under the mistaken impression that the substantive rule would be different in equity and in criminal cases. He did not so state in terms. But assume the error and it was ineffective. To the jury he gave the established rule of law, applicable alike in equity and on indictment, that an agreement upon uniform prices on the part of those controlling a substantial proportion of an industry is unlawful.

The error as to relevance of reasonableness of price is illustrated in the charges to the juries in the *Aileen Coal* and *Atlas Portland Cement cases,* quoted at pp. 35–37, footnote, of D. Br. The doctrine of those cases that the fairness of the agreed price is an issue for the jury would, however, render the Sherman Act unconstitutional under the doctrine of the *Cohen case.* And the judge who tried the *Aileen Coal case* has himself recognized that the offense stated in the second count of the present indictment alleging the agreement to deal only with the special class of jobbers is "an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder." *United States* v. *Southern Wholesale Grocers' Association,* 207 Fed. 434, 439.

A like misconception appears in the construction at D. Br. 35 of the case of *Thomsen* v. *Cayser,* 243 U. S. 66.

That case was one for damages under Section 7 of the Sherman Act, and the question of the reasonableness of the rate was determined by the jury as an element in their determination of the quantum of damages. 243 U. S. at p. 88. But the question whether the rate-making agreement was in itself an unlawful restraint of trade was considered at length by both the Circuit Court of Appeals and this Court as proper for their determination, rather than for the determination of the jury. 243 U. S. at pp. 82–87. The following quotation appears at p. 88:

> The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done *and its illegal effect.* (Italics ours.)

There is a striking conflict between the reliance placed on the *Aileen Coal* and *Atlas Portland Cement cases* by defendants, and the strong statement at p. 33 of their brief that proof of the unreasonableness of the uniform prices is *"an issue which is not at all involved in the case."* We concur in the latter view.

II

CONCERNING VENUE

The trial court charged the jury that the agreement constitutes the offense under the Sherman Act and that an overt act need not be proven. But in the case at bar an overt act renewing the conspiracy in the Southern District of New York was essential to jurisdiction. The Government's view is that—

> (1) Failure by defendants to object or except or call the attention of the trial court (*a*) precludes them from raising the point on appeal unless the error be so serious as to justify notice by the appellate court without assignment or error, and (*b*) indicates the understanding of all parties at the trial that under the evidence there could be no doubt of venue; and that—
>
> (2) Evidence probative of venue was in fact introduced in quantity by both sides, so that there was no conflict in evidence to submit to the jury.

The facts essential to venue are, of course, to be ascertained, not from the charge of the court but from the evidence.

Both court and counsel naturally assumed in the instant case that it was unnecessary to charge the jury upon an undisputed point. Had defendants' counsel presented a request to charge upon this ground, the charge would, no doubt, have been modified. But counsel made his request upon an en-

tirely different ground. (D. Br. 43.) In the absence of a proper request at the trial defendants on appeal must contend that this is a plain and highly prejudicial error. To this a short answer is that there was no conflict in the evidence to present to the jury.

Defendants further take occasion to criticize the Government for bringing the case to trial in New York. (D. Br. 46.) It is self-evident that the principal market of the defendants was in the Southern District of New York, and it is submitted that it was not improper to try a group of scattered conspirators in the district which was the principal theater of their conspiracy and immediately adjacent to the home of the majority.

III, IV

CONCERNING THE ADMISSION OF EVIDENCE

At D. Br. 54, defendants sum up their criticism of the question addressed on cross-examination to defendants' witness, Bantje, whether he did not know that the corporation, which he had been called to the stand to represent, had pleaded guilty to a violation of the Sherman Act. They argue that because we defend the question as addressed to the *bias* of the witness, we must concede that it was not addressed to his *credibility*. They misconceive our purpose. We *were* attacking his credibility. Evidence of bias is directly relevant to credibility.

The reasons supporting the question on redirect examination of Dyer, in regard to appearance of the secretary of the customer-jobbers' association before the Lockwood Committee, have been set forth in the opening brief.

V

CONCERNING THE EXCLUSION OF EVIDENCE

The gist of the offense under the Sherman Act is the unlawful agreement. It is immaterial whether the agreement is carried out. *Nash* v. *United States,* 229 U. S. 373. An ordinary knowledge of human nature suggests that the parties to such agreements will frequently break away and place immediate private advantage above loyalty to the unlawful conspiracy. The result is a defense based on the continuance of competition and irregularity in prices, the theory being that noncompliance with the terms of the alleged agreement evidences its nonexistence.

On the trial, therefore, defendants introduced evidence of a large number of instances in which they had not adhered to the terms of the agreement with which they were charged. Such facts were indirectly evidentiary on the question of whether an agreement had been in fact entered into.

They were not directly material or operative facts in the sense of constituting an element of the crime itself. They were indirectly material or

evidentiary facts. The admission of testimony as to merely evidentiary facts is largely within the discretion of the trial court. *Moore* v. *United States,* 150 U. S. 57, 60.

In the case at bar the trial court adopted the practice of admitting evidence as to actual facts of this type. It excluded statements by defendants' witnesses of their conclusions or inferences from such facts.

There was thus ample evidence of primary facts before the jury to present the defense. To exclude the vague and indefinite conclusions, themselves embodying the final inferences to be drawn from the primary facts, was a sound exercise of discretion. *Spring Company* v. *Edgar,* 99 U. S. 645, 658; *Chateaugay Iron Co.* v. *Blake,* 144 U. S. 476, 484.

The case might be otherwise if defendants lacked evidence of the facts themselves. But the Record showed (see P. Br. Point V and Appendix), that actual records were available.

Assume, however, that some or all of the rulings in question were error. The error is not prejudicial. Ample evidence was admitted to place before the jury the defense that was being offered.[1]

[1] The 200 witnesses for the Steel Corporation referred to by defendants (D. Br. 69–70) appeared in an equity case before a special examiner. Under those circumstances testimony of doubtful materiality is admitted without fear of misleading a jury. Indeed, the record in the *Steel case* covered 30 volumes collected over 166 days of testimony. Such a procedure would be unthinkable in a criminal action. As it is, the testimony of defendants' witnesses in the case

VI

CONCERNING THE FIRST COUNT

The argument in D. Br. 71–76, to the effect that the first count of the indictment does not state a crime, and is vague and indefinite, is based upon the assumption in the first point of their brief that to describe a uniform price-fixing agreement is not to describe an unlawful restraint of trade. In other words, decision on this point inevitably follows decision on the first point. An agreement among those who manufacture and sell upward of 85 per cent of all the sanitary pottery manufactured in the United States (Indictment, R. 6) to fix uniform prices for the sale of said pottery (Indictment, R. 9), and to do the other acts charged in that count of the indictment, is unlawful. P. Br. 11–27, and authorities there cited.

Defendants here contend that the circumstances governing reasonableness, and the reasonableness of the prices fixed, must be set forth in the indictment. They again cite (D. Br. 72) the *Aileen Coal* and *Atlas Portland Cement cases.* We

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at bar covers 297 of the 630 pages devoted to testimony, and their exhibits cover 1,967 of the 2,860 pages devoted to exhibits.

Furthermore, the witnesses in the *Steel case* were called primarily to testify as to the general competitive conditions in that commerce, all of which were there in issue. Such a broad issue by its nature does not permit of the specific evidence of facts which may be readily provided where the issue, as here, is solely as to competition in prices.

have already noticed, *supra*, p. 8, the striking conflict between this argument and their repudiation (D. Br. 30) of the issue of reasonableness of prices.

They further cite the *Chicago Board of Trade* (246 U. S. 231) and *National Window Glass* (263 U. S. 403) *cases* in this Court. The *Board of Trade case* involved a rule strictly limited as to time, type of transaction and scope of operation. The *Window Glass case* involved an attempt by a minority to preserve their competitive status against those who occupied the substantial position in the industry, and without any effect on prices. Neither is relevant to an agreement among those who occupy the position in an industry occupied by these defendants to fix standard and permanent prices for the commodity.

VII

CONCERNING THE SECOND COUNT

(A) *An agreement to sell to jobbers only was properly charged in the indictment.*

Defendants argue (D. Br. 76–79) that the phrase in the first paragraph of the second count of the indictment which refers to the conspiracy to confine "sales of sanitary pottery to a special group selected by said defendants by an agreement and known and denominated by them as 'legitimate jobbers,' " is to be read as referring to a group within the group of jobbers. Under ordinary rules of construction, the class of jobbers constitute a special group as distinguished from manufacturers, re-

tailers, etc.; and "legitimate jobbers" may well mean, as they did to the members of this association, those who had an exclusive jobbing business.

That the "legitimate jobbers" of the defendants were taken by the pleader to mean jobbers as a class, or special group, appears in the second paragraph of the second count, where "legitimate jobbers" are distinguished from other classes of consumers who are not jobbers at all (R. 12):

> That certain of said so-called "legitimate jobbers" carried on business within the Southern District of New York and maintained within said district offices and other places of business for the receipt, storage, sale, and distribution of sanitary pottery; that certain persons, firms, and corporations such as builders, owners, architects, general contractors, plumbing contractors, and plumbers, other than the said so-called "legitimate jobbers" selected by the defendants by agreement as aforesaid, maintained offices and other places of business within the Southern District of New York and were desirous of purchasing and attempted to purchase sanitary pottery directly from the defendants.

(B) *The court properly charged the jury that they must find an agreement.*

Defendants take exception (D. Br. 80) to the following portions of the charge (R. 702, 703):

> Secondly, that not only was such an understanding reached or agreement made or

> policy determined upon but that the defendants cooperated from time to time to carry out and enforce such an understanding. * * * The statute, however, condemns the adoption of any policy, agreement, or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others.

It is clear that it is not illegal for two individual manufacturers to have at the same time a common but independent policy to sell only to jobbers. Such a policy to limit sales to a particular class of middlemen is generally understood to retard progressive economic development, but it is not illegal unless determined upon by agreement. The trial court made clear to the jury that it is the element of agreement or combination in the concerted adoption of or determination upon a policy that renders it illegal.

The whole paragraph of the charge, from which defendants have quoted a portion, is as follows (R. 702–704):

> Under the second count of the indictment evidence has been offered on behalf of the Government to show an agreement or understanding that no sales by any member of the association should be made directly to owners of property, to builders of property, to architects, or to plumbers, and that the sales should be made only to or through so-called "legitimate jobbers." Secondly, that not

only was such an understanding reached or agreement made, or policy determined upon, but that the defendants cooperated from time to time to carry out and enforce *such an understanding.* Now, again I should repeat to you that the mere making of such agreements, if you find they were made, or such understandings, if from all the facts and circumstances you find that such understandings were reached, would in and of themselves be illegal, even though none of them were successfully carried out, and that would be true, even though the association or combination provided no machinery to carry them out. You should not concern yourself with the question whether in the absence of such an agreement the defendants nevertheless would have restricted their sales to jobbers, nor are you to inquire whether that is a commendable or usual trade practice. The law regards an agreement among manufacturers of a particular commodity to restrict their sales to a designated class to be in the nature of a boycott of those who do not fall in that denominated class and therefore has declared such an agreement to be illegal and to be in violation of the Sherman Act. *As I have had occasion to say before, every individual manufacturer has an absolute right not only to sell at any price that he chooses or to make any profit that he chooses, but to confine his sales to any group that he may select or refuse to sell to any group that he may select. The statute, how-*

> *ever, condemns the adoption of any policy, agreement, or understanding* on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others. If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then, under the law the defendants are guilty of a combination and conspiracy to restrain trade. And if you find that the defendants did so combine and conspire to restrict their sales to jobbers only, any good intentions they may have had in such course will not make such an agreement legal or relieve defendants from the consequence of their acts. You will not consider in this connection any suggestion that the course pursued was necessary to the protection of the jobber or promotive of the public welfare. (Italics ours.)

Read as a whole, therefore, this portion of the charge clearly makes illegality dependent upon agreement.

Even if read alone and apart from their context, however, the references to "policy determined upon" may be taken as merely a practical description of a method of reaching an agreement between competitors. This was the situation in the steel trade at the time of the Gary dinners. Those dinners were informal meetings of the leaders of the steel industry, at which prices and terms had been discussed and "declarations of purpose" entered into. No contracts had been made. But both opinions in the District Court (*United States* v. *United States Steel Corporation,* 223 Fed. 55), although they united upon the dismissal of the Government's bill on other grounds, were in agreement upon the illegality of these dinner discussions and their "declarations of purpose." Opinion of Judge Buffington, at p. 160; concurring opinion of Judge Woolley, at p. 175.

(C) *Whether an agreement to confine sales to jobbers is a commendable trade practice is not properly in issue.*

The problem whether concerted restriction, by a substantial proportion of those engaged in the production of a given commodity, of sales to a special class of middlemen, e. g., jobbers, is a commendable trade practice is not properly for the jury. This class of restrictive agreement falls within the same principle of law as does the type of restrictive agreement charged in the first count of the indictment.

The judge was making clear to the jury that the gist of an offense against the Sherman Antitrust Act is the *agreement*. In later portions of the charge this was amplified, and the court carefully avoided the danger of allowing the jury to conclude that illegality would lie merely in contemporaneous and independent action to the same effect by different individuals. He recognized the correctness of the quotation from *United States* v. *Piowaty*, 251 Fed. at p. 377, which heads the argument in D. Br. 86 on this point:

> In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided and beyond its proper meaning, and would cause the greatest confusion and uncertainty.

and evidenced that recognition by continuing the charge, as follows (R. 703):

> * * * As I have had occasion to say before, every individual manufacturer has an absolute right not only to sell at any price that he chooses or to make any profit that he chooses but to confine his sales to any group that he may select or refuse to sell to any

> group that he may select. The statute, however, condemns the adoption of any policy, agreement, or understanding on the part of a group of manufacturers in control of a substantial part of an industry to confine its sales to any class to the exclusion of others. If you find that the minds of these defendants met and they tacitly or expressly agreed to restrict their sales to jobbers, then the defendants have contravened the Sherman Act and are guilty of combining and conspiring to restrain trade and commerce in that commodity as charged in the second count of the indictment. If, therefore, you find from all the evidence bearing on the subject some promise, either express or implied, or any assent to the proposition that the defendants should conform their conduct to some prescribed rule the aim and purpose of which was to restrict their sales to jobbers only, then under the law the defendants are guilty of a combination and consipracy to restrain trade.
>
> See also R. 695, 697–698.

To constitute an unlawful combination the agreement need not, of course, be the type of contractual agreement recognized by the law. Nor need it be express. Thus Professor Williston on Contracts, Vol. I, Sec. 2:

> An agreement is the expression by two or more persons of assent to some present or future performance by one or more of them. Agreement is in some respects a wider term

> than contract. * * * It also covers promises to which the law attaches no legal obligation.

And in *United States* v. *United States Steel Corporation,* 251 U. S. 417, 440, 445, this Court recognized that even "the social form of dinners" might be a violation of the law. Both opinions in the District Court were in agreement that they were illegal. *Supra,* p. 19.

Respectfully submitted.

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